Supreme Court U.S.
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No. 05-1652

IN THE SUPREME COURT OF THE UNITED STATES

WARREN L. PULLIAM

Petitioner,

versus

OHIO CASUALTY INSURANCE COMPANY

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "storm warnings" doctrine applies to RICO cases and, so assuming, what quantum of knowledge by the plaintiff triggers accrual of the statute of limitations.

2. Whether Rule 60(b), F.R.C.P. or Kentucky's CR 60.02 applies in diversity cases.

3. Whether the United States Court of Appeals for the Sixth Circuit is authorized to disregard a clear holding of this Court because the panel disagreed with this Court's decision?

4. Whether the trial court was required to apportion liability among the parties and other settling tortfeasors in the instant case.

5. Whether the holding of the Kentucky Supreme Court *Terwilliger v. Terwilliger*, Ky., 64 S.W.3d 816 (2002) applies to the case at bar.

6. Whether the holding of *Tankrederiet Geifon A/S v. Hyman Michaels Co.*, 406 F.2d 1039 (6th Cir. 1969), and its progeny, applies to the case at bar.

7. Whether the Respondent's failure to allege the elements required by *Tankrederiet Geifon A/S v. Hyman-Michaels Co.* is such a jurisdictional defect as renders the Complaint void *ab initio.*

8. Whether the eliciting of testimony known to be false by the Respondent at the trial of the instant case, constitutes "fraud on the court."

9. Whether the filing by Respondent of documents known to be inaccurate, as an attachment to its Complaint, constitutes "fraud on the court."

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2005
No._____

Warren L. Pulliam, Petitioner,
v.
Ohio Casualty Insurance Company, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Warren L. Pulliam, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on December 22, 2005.

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix B) was entered on December 22, 2005.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(i).

PARTIES

Warren L. Pulliam, Petitioner.

Ohio Casualty Insurance Company, Respondent

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STATUTES INVOLVED

Rule 60(b), F.R.C.P.

STATEMENT OF THE CASE

Procedural history.

This action arises out of a Complaint filed in the United States District Court for the Western District of Kentucky on May 25, 1990 by the Ohio Casualty Insurance Company (hereafter "Respondent" or "Ohio Casualty") against Warren L. Pulliam (hereafter "Petitioner" or "Pulliam"). That Complaint sought to hold Pulliam liable for a Judgment which had been entered by agreement of the parties on October 12. 1989, in action # 88-CI-00812, Jefferson Circuit Court, *Barnett Bank of Tampa, N.A. v. Peoples State Bank of Chaplin, Kentucky* (hereafter referred to as "the Jefferson Circuit Court action" or "the underlying action.")

A jury trial was conducted in the instant case on June 30, 1992, July 1, 1992 and July 2, 1992. At the end of that trial, the jury returned a verdict in favor of the Respondent, Ohio Casualty, in the amount of two hundred thousand dollars ($200,000.00), and Judgment was entered of record by the United States District Court for the Western District of Kentucky (hereafter referred to as "the trial court" or "the district court") on July 8, 1992.

Thereafter, on October 17, 1995, Pulliam moved the trial court, pursuant to Rule 60(b), F.R.C.P., to Alter or Amend its Judgment. That court denied that Motion by Order dated October 2, 1996 and entered of record October 7, 1996. The Petitioner timely appealed that Order to the United States Court of Appeals for the Sixth Circuit, which denied the Appeal and affirmed the Judgment of the trial court, by Order dated June 23, 1999. The Petitioner then petitioned that Court to grant a rehearing *en banc*, which Motion was denied. Petitioner then petitioned this Court to grant certiorari in this case; that Petition was, likewise, denied.

On March 5, 2004 the Petitioner filed a second Motion

to Set Aside Judgment, pursuant to Rule 60(b), F.R.C.P., in the district court. The district court denied that Motion by Order dated October 6, 2004. On October 14, 2004, Petitioner filed a timely Motion to Alter or Amend, which was denied by Order dated November 19, 2004. The Petitioner then filed an appeal to the United States Court of Appeals for the Sixth Circuit, which denied that appeal, and likewise denied his petition for rehearing. This appeal followed.

Relevant facts.

The events which form the basis of this action occurred in the fall of 1986. During that time, Warren L. Pulliam was the president of Peoples State Bank, Chaplin, Kentucky. The Pulliam family had owned a majority of the stock of Peoples Bank since the 1950's.

In 1984, Pulliam and James O. King, Jr., (hereafter "King"), the bank's C.P.A., each purchased one-half of the stock in Nelson Bancorp, Inc., which owned Peoples Bank.

In the spring of 1986, Donald R. Tibbitts (hereafter "Tibbitts") and Benham Mirzaian (hereafter "Mirzaian"), agents of the Prudential Insurance Company of America and of Prudential-Bache Securities, Inc. (hereafter collectively referred to as "Prudential") appeared in the Chaplin, Kentucky area promoting a number of investment schemes. During the ensuing ten months, Prudential's agents sold over $1.6 million of fraudulent securities in the Chaplin area.

During the course of these activities, both Tibbitts and Mirzaian opened business accounts at the Peoples Bank. On April 4, 1986, Tibbitts invested $400,000.00 of Peoples Bank's assets in Prudential securities. On April 7, 1986, Tibbitts personally assigned a certificate of deposit in the amount of $40,000.00 to Peoples Bank as a guarantee that the Bank's investment would yield a return of at least 10%. This guarantee was a clear violation of applicable securities regulations.

In November, 1986, Pulliam issued certified checks in excess of $800,000.00 for Tibbitts and Mirzaian. These checks were covered by funds transmitted by wire to Peoples Bank from Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank"), and Peoples Bank suffered no loss. These funds were secured by

irrevocable letters of credit issued by Prudential with Barnett Bank listed as the beneficiary and by one million shares of common stock in Video Communications, Inc. which had been assigned to Barnett Bank by the United States Mortgage and Trust Company, Inc., of Lexington, Kentucky, which owned the stock.

On December 3, 1986, Tibbitts deposited to the account of Peoples Bank at Liberty National Bank (Peoples' correspondent institution) a check drawn on Douglas A. Murdock (hereafter "Murdock") at Barnett Bank in the amount of $460,000.00. Also on December 3, Tibbitts deposited to the same account a check drawn on Tibbitts' account at BankOne of Lexington in the amount of $275,000.00. Both of these checks were dishonored by the drawee banks for insufficient funds.

On December 14, 1986, Pulliam demanded that Tibbitts furnish security to cover the certified checks. Tibbitts thereupon caused Murdock to tender to Pulliam one million shares of common stock in Video Communications, Inc. as collateral for Peoples Bank. This stock was assigned to Peoples Bank by the United States Mortgage and Trust Company, Inc., owners of said stock. This stock was worth more than three dollars per share, or three million dollars, on that date, as verified by Barnett brokerage.

On December 16, 1986, Barnett Bank wire-transferred $100,000.00 to Peoples Bank, despite its knowledge that problems existed on December 3, 1986.[1] On December 18, 1986, after Barnett Bank knew that Pulliam had been dismissed as president of Peoples Bank because of these transactions and that King was now president, Barnett Bank nevertheless wire-transferred an additional $75,000.000 to Peoples Bank. On December 19, 1986, Barnett Bank wire-transferred a further $261,000.000 to Peoples Bank.

Upon learning of the shortfall at Peoples Bank on December 16, 1986, Pulliam's partner and C.P.A., King, coerced Pulliam to meet with King and with his attorneys James R. Straus and Charles F. Pritchett, Jr. (hereafter "Straus" and

[1]1. Barnett Bank should have been on notice that there were problems in Murdock's accounts because Barnett Bank had dishonored the prior check of its customer, Murdock, in the amount of $460,000.00.

"Pritchett") within the next twenty-four hours. This meeting took place on December 16, 1986, at 5:00 p.m. at the law offices of Brown, Todd & Heyburn, P.L.L.C. (now Frost Brown Todd, LLC) in Louisville, Kentucky.

King instructed Pulliam to bring with him all of his shares of stock in Nelson Bancorp, Inc., which owned Peoples Bank; this constituted fifty percent of the total number of shares of Nelson Bancorp, Inc. King, Straus and Pritchett met with Pulliam and persuaded him **(1)** to execute a restitution agreement; **(2)** to surrender his certificates of stock in Nelson Bancorp, Inc. to King; and **(3)** to tender to King an option to purchase this stock for less than its actual value.

King, Straus and Pritchett also induced Pulliam **(4)** to sign a restitution agreement by which Pulliam covenanted to indemnify Peoples Bank for any losses it might sustain because of the certified checks which he had issued. Straus and Pritchett induced Pulliam to sign the restitution agreement which they had already prepared, **while Pulliam was without counsel, by purporting to be his counsel.** Tibbitts, Mirzaian, and Pulliam were subsequently convicted of bank fraud. Pulliam would not defraud himself.

On February 1, 1988, Barnett Bank of Tampa, N.A. filed an action against Peoples Bank in Jefferson Circuit Court in Louisville, Kentucky. Barnett Bank alleged that its loss had been $835,000.00. Neither Barnett Bank nor Peoples Bank impleaded Pulliam as a party to that action, although Peoples Bank had stated in its answer that Pulliam was a necessary and indispensable party. Through pretrial discovery, Peoples learned that Barnett Bank's actual loss had been only $633,500.00, rather than the amount set out in its pleading.

However, neither Peoples Bank nor Barnett Bank advised the Jefferson Circuit Court of this fact, nor did Barnett Bank amend its complaint to correct the error. In fact, Barnett Bank resisted disclosing this fact to Peoples Bank and its counsel, and after being forced by court order to disclose the actual amount of its loss, Peoples Bank and Barnett Bank secured no fewer than five protective orders from the court to insure that no one else (including its supposed indemnitor Warren Pulliam) would become aware of this fact. **The protective orders further provided that any of the**

documents and other evidence could be destroyed by counsel, without obtaining the court's permission.

After Barnett Bank had been forced to disclose the true amount of its loss, Barnett Bank and Peoples Bank immediately began negotiations for settlement of the action. Peoples Bank also filed a proof of loss claim with Ohio Casualty Insurance Company, which provided the Banker's Blanket Bond.. **Ohio Casualty participated fully in the settlement negotiations. Its counsel then repeatedly denied that Ohio Casualty had been a party to those negotiations.**

Neither Peoples Bank nor Ohio Casualty offered to allow Pulliam to assume defense of the action. On Friday, April 14, 1989, less than a month after Barnett Bank had been forced to reveal the actual amount of its loss, Ohio Casualty's Surety and Fidelity Claims Representative, William Thomas Jones (hereafter "Jones") visited Warren Pulliam and his wife at Pulliam's insurance office at Chaplin, Kentucky and advised him that settlement negotiations were in progress. Jones then asked whether Pulliam would be interested in contributing to the settlement offer.

Pulliam asked Jones what settlement terms were being proposed, and Jones declined to disclose that information to Pulliam. When Pulliam indicated that he wished to defend the action, Jones terminated the discussion, and on the following Monday prepared a "Memo to File" which noted Pulliam's desire to defend the action and suggested that a better course would be for Ohio Casualty and Peoples Bank to settle the action without allowing Pulliam to participate, and then recoup the entire amount of the settlement from Pulliam. The Memorandum also states that "Jim King personally" had agreed to contribute $50,000 "toward any settlement offer made."

Pulliam, through his attorney, offered to contribute to any settlement offer. Pulliam's attorney was told that Ohio Casualty and Peoples Bank would "get back to" him. Pulliam, accordingly, waited to receive further word concerning the settlement negotiations. Ohio Casualty and Peoples Bank, however, concluded their settlement negotiations with Barnett Bank without further contacting Pulliam, who first learned of the settlement when he received a demand letter from Ohio Casualty asking him to reimburse Ohio Casualty for the amount

of the settlement. Pulliam responded that he was under no obligation to repay Ohio Casualty, since he had not agreed to the settlement terms.

Ohio Casualty then filed the instant action against Pulliam in the United States District Court for the Western District of Kentucky. That case came on for jury trial on June 30 _ July 3, 1992. During the course of that trial, Peoples Bank's counsel, Charles F. Pritchett, Jr., appeared as a witness for Ohio Casualty, and testified that the total amount of Barnett Bank's loss had been $834,000.00, although he necessarily knew that the correct figure was $633,500.00.

Mr. Pritchett also stated that Barnett Bank had told him that the Video Communications stock which both Barnett Bank and Peoples Bank were holding as collateral, was "worthless", **although Barnett Bank had, in fact, provided him with documents showing that "Barnett brokerage" had estimated the stock's value at six million dollars.**

Mr. Pritchett also testified that Barnett Bank had told him that a letter of credit executed by Prudential Bache Securities in the amount of $700,000.00, which Barnett Bank had been holding as collateral, "was bogus", when Pritchett well knew that Barnett Bank had not only insisted that the letter of credit was genuine, but had also collected $282,500.00 based, at least in part, on the genuineness of that letter of credit. Mr. Pritchett also testified that he did not know whether Prudential had any right of reimbursement against Barnett Bank when, in fact, he had in his possession a copy of the agreement between Prudential and Barnett Bank and must necessarily have known whether or not it provided for reimbursement.

At the conclusion of the trial, the jury awarded judgment against Pulliam in the amount of $200,000.00. Pulliam subsequently, on October 17, 1995, filed a Motion, pursuant to Rule 60(b), F.R.C.P., asking the district court to set aside that Judgment.. The motion was denied by order dated October 7, 1996. Pulliam appealed that denial to the United States Court of Appeals for the Sixth Circuit, action No. 96_6522, *Warren L. Pulliam v. Ohio Casualty Insurance Company*. That Court denied his appeal by order dated June 23, 1999. In its opinion, that Court stated:

Pulliam failed to explain the lengthy delay, and

> he failed to produce evidence to support his extraordinary motion. In fact, Pulliam conceded that he could not prove the fraud he alleged.

Order of 6/23/99.

Pulliam inferred from the court's statement that, if he had been able to prove the fraud which he had alleged, he would have prevailed. Pulliam, therefore, sought to obtain the evidence necessary to prove his case.

The court's Order was issued n Wednesday, June 23, 1999 and arrived at Pulliam's counsel's office in Louisville on or about Friday, June 25, 1999. Two weeks later, on Friday, July 9, 1999 Pulliam served a request for the needed documents upon Ohio Casualty's counsel. Ohio Casualty vigorously resisted producing these documents, and did not do so until more than a year later, on July 14, 2000; and its designated representative, who could explain and authenticate the documents produced, did not sit for deposition until twenty-one months after this, on April 17, 2002. Therefore, although Pulliam requested the necessary documents within two weeks of receiving the Sixth Circuit's Order, Ohio Casualty did not produce the documents, and properly authenticate them, until thirty-three months after it had received the request.

Ohio Casualty had, in the meantime, filed a collection action in Nelson Circuit Court, 93_CI_00130, *Ohio Casualty Insurance Co. v. Warren L. Pulliam, et al.* In addition to Warren L. Pulliam, Ohio Casualty named as parties defendant Pulliam's wife, his son, his insurance agency, an employee of that agency, Paul A. Sims, and Pulliam's corporation, W & J Pulliam, Inc.

Pulliam and his codefendants in that case undertook extensive discovery, which was resisted by Ohio Casualty. As a result, although that case has now been pending for more than thirteen years, and has been vigorously litigated by Pulliam and his co-defendants, it has not yet come to trial.

On July 14, 2000, after a year long fight in which Ohio Casualty resisted the Petitioners' request for production of documents, Ohio Casualty provided 2548 pages of documents which had not previously been available to the Petitioners. **These documents showed conclusively that Ohio Casualty and Peoples Bank had, in fact, been guilty of fraud and**

collusion to settle the Jefferson Circuit Court action to Pulliam's detriment, without securing his consent to the settlement terms, and to then force him to pay the full amount of that judgment.

In 1999, when they requested the production of documents, Pulliam and his codefendants had also noticed the deposition of Ohio Casualty's designated representative, for the purpose of verifying and explaining the documents thus produced. This notice of deposition was opposed, by various means, and it was **not** until nearly **two years** after the production of documents, and nearly **three years** after the deposition had first been noticed, that Ohio Casualty's designated representative appeared and was asked to verify the documents thus produced.

However, when Ohio Casualty's designated representative, Thomas Caldwell, finally sat for deposition on April 17, 2002, he testified that he had **no** knowledge whatever about the matters concerning which he had been subpoenaed to testify; nor did he provide any additional documents in response to the subpoena *duces tecum* which had been served upon Ohio Casualty. Caldwell was, consequently, unable to authenticate the documents which Ohio Casualty had provided in document production nearly two years earlier. However, the defendants had also subpoenaed Mr. Caldwell's predecessor as Fidelity and Surety Claims Manager, William Thomas Jones, and Mr. Jones was able to verify and explain many of the documents.

After obtaining this testimony, on March 5, 2004, Pulliam filed a second Motion pursuant to Rule 60(b), F.R.C.P., asserting that he was now able to prove the allegations which for which he had previously been unable to provide evidentiary support. On October 6, 2004, the trial court denied that Motion in a brief Order which stated, conclusorily, that it was "crystal clear" that Pulliam's Motion had come "far too late". Because the trial court failed to set out reasons for so concluding, Pulliam filed a Motion pursuant to Rule 59(e), F.R.C.P., in which he asked that court to make findings and conclusions.

The trial court denied that Motion by Order dated November 19, 2004. The Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit, which denied his appeal. This appeal followed.

REASONS FOR GRANTING THE WRIT

1. Pulliam's Motion is not time-barred.

As noted above, Judge Simpson did not make findings of fact and conclusions of law. Consequently, it is not possible to ascertain exactly why he believed it to be "crystal clear" that the instant Motion comes "far too late." Perhaps Judge Simpson believed that Pulliam's right to seek relief under Rule 60(b) was barred by the one year limitation governing grounds (1), (2) and (3) of Rule 60(b), or by laches.

If such be Judge Simpson's meaning, Petitioner insists that the trial court has misapprehended the law on this point. It is elementary that neither limitation nor laches runs where the cause of action has been fraudulently concealed by the defendant and is not discovered by the plaintiff until after such period has expired. *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612, 614 n. 7 (5th Cir. 1963). This equitable doctrine, known as the "discovery rule," is to be applied circumspectly on a case-by-case basis. *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612, 614 n. 7 (5th Cir. 1963).

The Sixth Circuit rule on this point is set out in *New England Health Care Employees Pension Fund v. Ernst & Young*, 336 F.3d 495 (6th Cir. 2003):

> The majority view, however, is that knowledge of suspicious facts - "storm warnings," they are frequently called - merely triggers a duty to investigate, and that the limitation period begins to run only when a reasonably diligent investigation would have discovered the fraud.

New England Health Care Employees Pension Fund v. Ernst & Young, 336 F.3d at 501 (citations omitted).

While the foregoing case involved securities fraud, the Sixth Circuit applies the same rule in RICO actions. *Isaak v. Trumbull*, 169 F.3d 390 (6th Cir. 1999).

Prior to July 14, 2000, Pulliam had learned, from the trial testimony of Charles F. Pritchett, Jr., Esq., the bare fact that Barnett Bank and Prudential had reached a settlement, and

that Barnett Bank had been paid an undisclosed sum pursuant to that agreement. At the trial, Mr. Pritchett declined to disclose the amount paid, and Judge Johnstone did not require him to do so.

Pulliam also knew that Peoples Bank's counsel, Mr. Pritchett, had argued in a Motion to Compel Production of that settlement agreement, that this sum **might be** available to Peoples Bank as a setoff against the amount Barnett Bank was seeking to recover.

However, since the Jefferson Circuit Court action was settled pursuant to an agreement of the parties, who then obtained no fewer than five separate protective orders to assure that no one else (including Warren Pulliam, from whom Peoples Bank and Ohio Casualty intended to seek a full recovery) could gain access to that settlement agreement, Pulliam was not able to ascertain whether the sum recovered from Prudential by Barnett Bank **was**, in fact, available as a setoff for the amount which Barnett Bank had sought to recover from Peoples Bank. Pulliam had obtained only enough information to make it appear **possible** that such was the case.

The rule set out in *New England Health Care* makes it clear that such a quantum of information does not suffice to trigger the running of limitations. As one treatise has succinctly noted: "There must be more than mere suspicion." CALVIN W. CORMAN, LIMITATIONS OF ACTIONS § 11.51 at n. 10 (1991), *citing, L.C.L. Theatres v. Columbia Pictures Indus.*, 566 F.2d 494, 497 (5th Cir. 1978).

The facts of which Pulliam was aware prior to July 14, 2000 were, in the words of the Sixth Circuit, "storm warnings" which clearly placed Pulliam on inquiry notice. He did, in fact, undertake a diligent inquiry. Both Prudential's attorney, William W. Allen, Esq., and Ohio Casualty's attorney, Timothy D. Martin, Esq., led him to believe that no such agreement existed. This concealment prevented Pulliam from discovering sufficient facts to state a cause of action until July 14, 2000 (although Ohio Casualty had been ordered to produce them on February 2, 2000), when Ohio Casualty finally produced a copy of the settlement agreement and release between Prudential and Barnett Bank; and it prevented Pulliam from verifying the authenticity of those 2548 pages of documents until April 17,

2002.

Under the foregoing rule, such concealment, which prevents an aggrieved party from discovering the necessary facts despite his having made a reasonable investigation, clearly tolls the running of the statute of limitations.

> Under the federal equitable tolling doctrine, concealment of fraudulent conduct tolls the running of the statute of limitations in favor of the defrauded party until that party learns of the fraudulent conduct of the opposing party, provided the defrauded party could not have discovered it at an earlier date by the exercise of reasonable diligence.
>
> . . . . . .
>
> Active concealment frequently increases the difficulty of discovery, thereby justifying the aggrieved party's failure to learn of the fraud at an earlier date. The standard for discovery also is mitigated by the defendant's greater knowledge of the transaction or greater access to information or by a fiduciary relationship between the parties.

CORMAN, *supra*, § 11.5.1 at nn. 13, 16_18.

Judge Simpson may have assumed that the Petitioner's right to seek relief under Rule 60(b) accrued when Pulliam discovered that he had been injured. As shown above, such is not the law in the Sixth Circuit. That right does not accrue until the injured party has discovered sufficient facts underlying the injury to enable him to defend on that basis. Pulliam's right to seek Rule 60(b) relief did not accrue until he was able to verify the authenticity of the documents which Ohio Casualty had provided in discovery on July 14, 2000. As shown above, this did not occur until Ohio Casualty's designated representative, Thomas Caldwell, and his predecessor, William Thomas Jones, gave their depositions on April 17, 2002.

2. This Court should resolve a split among the circuits.

This case affords the Court an opportunity to resolve a split among the circuits concerning when a RICO cause of action accrues in cases involving allegations of fraudulent concealment. Indeed, in its most recent pronouncement on the subject, this Court specifically noted that it had left the question unresolved. *Rotella v. Wood*, 528 U.S. 549, 554 n. 2 (2000).

In *Issak v. Trumbull*, 169 F.3d 390 (6th Cir. 1999), the Sixth Circuit held that the "storm warnings" doctrine developed in security fraud cases also applied to RICO actions. Two years later, the Third Circuit applied the "storm warnings" doctrine in a RICO context. *Matthews v. Kidder, Peabody & Co.*, 260 F.3d 239, 255 (3d Cir. 2001).

In the related action, *Sims v. Ohio Casualty Ins. Co.*, action 03-6398, the Sixth Circuit stated that the "storm warnings" themselves had placed Pulliam on inquiry notice and triggered accrual of the statute of limitations.

> As this court has held, "the running of the statute of limitations begins when a plaintiff is put on inquiry notice–that is, when the plaintiff has been presented with evidence suggesting the possibility of fraud." *Isaak v. Trumbull Savings & Loan Co.*, 169 F.3d 390, 399 (6th Cir. 1999). A plaintiff need only be aware of "storm warnings" **but does not need to "hear thunder" and "see lightening"** *Id.*

Slip Opinion at 5.

This holding directly contradicts the Third Circuit's holding in *Matthews*, in which that court wrote:

> [I]f the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries. This inquiry is both subjective and objective. The plaintiffs must first show that they investigated the suspicious circumstances. Then, we must determine whether their efforts were adequate.

Matthews v. Kidder, Peabody & Co., 260 F.3d 239, 255

The court below clearly declined to pursue this further inquiry. Under the Third Circuit's test, plaintiffs would have

– been entitled to such a determination. The Court, therefore, should grant certiorari to resolve this split among the circuits. Otherwise put, if the instant action had been instituted in the Third Circuit instead of the Sixth Circuit, it would not have been time-barred. This disparity of results between circuits requires that this Court grant certiorari to resolve the split in authority.

3. This action is governed by Kentucky's CR 60.02.

In Ohio Casualty's brief to the Sixth Circuit, Respondent acknowledged that the crux of Pulliam's argument is that "fraud was committed upon the United States District Court, Jefferson Circuit Court and Nelson Circuit Court" and that "this fraud was committed by Ohio Casualty, its agents, servants, and those acting in concert with them."

The Respondent's response was in the nature of a confession and avoidance; that is, while Ohio Casualty did **not** deny that the allegations of fraud were true, and did not deny that they constitute intrinsic fraud (that is, fraud on the opposing party), Respondent denied that these wrongful acts constituted extrinsic fraud, or "fraud on the court," **under the federal rules.**

The appeals panel of the Sixth Circuit evidently agreed with Ohio Casualty. In the only reference which it made to this dispositive point, the panel stated in a footnote:

> Before this court, Pulliam intimates that the Kentucky Supreme Court decision in *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 818 (Ky. 2002), which, for purposes of Kentucky law, equated "fraud on a party" with "fraud affecting the proceedings," eliminates any distinctions between the two manifestations of fraud. Regardless of the merit or lack of merit of the Kentucky position, the justices of the Kentucky Supreme Court cannot alter the framework of *Federal* Rule of Civil Procedure 60(b) that is to be applied in *federal* court proceedings.

Slip Opinion at 4, footnote 1 (emphasis by court)

Respectfully, the Petitioner insists that the court below has misconceived the law on this point. In *Guaranty Trust Co.*

v. York, 326 U.S. 99 (1945). This Court stated:

> **The intent of [*Erie R. Co. v. Tompkins*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.**

Guaranty Trust Co. v. York, 326 U.S. at 109.

> In a similar vein, the Sixth Circuit has recently stated:
>
> [I]n order to be consistent with the principles of federalism underlying *Erie* and *York*, we hold that a claim that would have been timely in state court should not be time-barred in federal court.

Powell v. Jacob Communications Corporate, 320 F.3d 599 (6th Cir. 2003)

In its brief, however, Ohio Casualty relied on a single case, *Hanna v. Plumer*, 380 U.S. 460 (1965) (Appellee's Brief at 12). That case is readily distinguishable from the instant case upon its facts. Moreover, this Court has declared: "**It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship.**" *Fidelity Trust Co. v. Field, infra*, 311 U.S. at 180. Furthermore: "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 423, 427 (1996).

Furthermore, under *Erie*, federal courts follow state law as to matters of substance.

> Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

Gasperini v. Center for Humanities, Inc., 518 U.S. 423, 427 (1996).

It is well established that the question of limitations is a substantive issue which must be governed by state law.

"[S]tatutes of repose are treated as substantive." *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 465 (2003).

It is clear, therefore, that the panel's *dicta* concerning *Terwilliger* misstates the applicable law. The rule set out in *Terwilliger* governs the case at bar, and it requires this Court to hold that Ohio Casualty's fraud on the opposing party, which it has admitted *sub silentio*, also constitutes "fraud on the court."

The Kentucky Supreme Court has recently clarified the meaning of "fraud on the court." In *Rasnick v. Rasnick*, Ky. App., 982 S.W.2d 218 (1998), the Kentucky Court of Appeals had held that CR 60.02(d), which corresponds to Rule 60(b)(3), F.R.C.P., applied only to "intrinsic fraud," but not to "extrinsic fraud." This is, of course, the same understanding of the rule which was followed by the trial court in its prior order.

Four years later, in *Terwilliger v. Terwilliger*, Ky., 64 S.W.3d 816, 818 (2002), the Kentucky Supreme Court overruled *Rasnick*, noting that the *Rasnick* court had adopted "an overly restrictive conception of CR 60.02(d)." 64 S.W.3d at 818. The court went on to state that "**the presentation of perjury or falsified evidence . . . is clearly a fraud upon the court.**" The court further stated that **providing false or misleading information to the opposing party** also constituted such fraud as would justify disregarding the one year time limitation for reopening a judgment on the basis of fraud.

Petitioner submits that, under the rule set out in *Terwilliger*, he has now shown such fraud on the court as entitles him to disregard the one year time limitation, which is applicable to other types of fraud.

Therefore, in accordance with this Court's dictate, the court below should have granted a further judicial review of the matter, and should have considered the new evidence and case law which has been obtained by Pulliam.

4. The court below is bound by holdings of this Court.

In the course of oral argument before the Sixth Circuit on October 31, 2005, the following colloquy occurred, with reference to whether the court below is bound by the holding of *Terwilliger*:

> Judge Daughtrey: Did they use the term, "fraud on the court"? . . .
>
> Mr. Tabler: It says, "At 64 S.W.3d 818 the court went on to state that the presentation of perjury or falsified evidence is clearly a fraud upon the court."
>
> Judge Daughtrey: That's my point. If we state for purposes of federal law, for purposes of 60b law in federal court, that any time there's perjury in a case you can come back into court years later and say it's a fraud on the court, we will never get these cases completed and this is a good example of it.

Hearing of 10/31/05 at 33:50 - 34:33

Defendant submits that, reasonably construed, the foregoing colloquy between Petitioner's counsel and Judge Daughtrey indicates that the panel was well aware that, under the holdings set out above, it was required to apply the Kentucky rule enunciated in *Terwilliger*, but that it chose not to do so, for policy reasons.

Respectfully, Petitioner submits that the court cannot decline to follow a holding of this Court simply because it disagrees with that holding. As the treatise American Jurisprudence, Second Edition, sets out the rule:

> A court lower in rank than the court which made the decision invoked as a precedent cannot deviate from such precedent and make a contrary decision, irrespective of whether it considers the rule laid down in such precedent to be incorrect.

20 AM. JUR.2D *Courts* § 165 at n. 36 (1995).

The Sixth Circuit's failure to cite any supporting

authority in footnote one of its opinion, in which the panel explained why it had not followed the rule set out in *Terwilliger*, lends support to the presumption that the Sixth Circuit refused to follow what it well realized was binding precedent, because it did not like the result which was produced in this particular instance.

Such policy-oriented deviation from the rule of *stare decisis* is clearly erroneous, and requires that the case be reversed and remanded.

5. The trial court failed to apportion liability among the parties.

The Defendant also argued, both in the trial court and in the court below, that the trial court had failed to require the jury to apportion liability among the parties, as Kentucky law required.

The Kentucky Supreme Court modified the Commonwealth's prior rule in this regard, in *Hilen v. Hays*, Ky., 673 S.W.2d 713 (1984). This rule was then codified by the Kentucky General Assembly as K.R.S. 411.182 and K.R.S. 454.040.

The Kentucky Supreme Court stated in 1990 that as a result of these changes in prior law:

> . . . liability among joint tortfeasors is no longer joint and several but is several only. Because the liability is several to each negligent joint tortfeasor, it is necessary to apportion a specific share of the liability to each of them.

Dix & Associates Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24, 27 (1990).

Such was clearly the law in Kentucky, **both** when this action was filed in 1990, and when the case was decided in 1992. Because this action sounds in diversity, the court was required to follow Kentucky law on this point. Moreover, since the statutory language is mandatory, Petitioner could **not** have waived this point by failing to ask for a jury instruction on apportionment.

6. The Complaint fails to state a claim.

To state a claim for indemnity, an indemnitee who has settled a claim prior to judgment must plead and prove that he either tendered the defense to the indemnitor and was refused, of that the indemnitor approved the settlement terms. The instant complaint does not even assert that such is the case; and Ohio Casualty certainly made no attempt to prove such fact at trial.

The instant complaint, therefore, fails to state a claim on which relief may be granted. Moreover, this is a jurisdictional defect which may be taken advantage of by a collateral attack under Rule 60(b)(4). *Dix & Associates Pipeline Contractors, Inc. v. Key*, Ky., 799 S.W.2d 24, 27 (1990).

Petitioner raised this point in the courts below, and in related cases pending in Kentucky state courts. It has never been addressed either by Ohio Casualty, or by the Court.

6. Petitioner can demonstrate fraud.

As noted above, when it denied his prior Rule 60(b) Motion, this Court stated:

> Pulliam failed to explain the lengthy delay, and he failed to produce evidence to support his extraordinary motion. In fact, Pulliam conceded that he could not prove the fraud he alleged.

Order of 6/23/99 (emphasis added).

Implicit in this language is the converse holding, that if Petitioner Pulliam had produced evidence and had the discovery now given to support his claims of fraud, coercion and collusion, he would have been entitled to relief under Rule 60(b) in 1995. As a result of the discovery obtained July 14, 2000, the fraud, conspiracy and collusion which Petitioner Pulliam alleged in his prior Motion to Alter or Amend, can now be dispositively, conclusively, and irrefutably proven.

Petitioner can also demonstrate that the "lengthy delay" of which this Court took note, was not due to his own laches, but resulted from the misrepresentations and concealment of Ohio Casualty and its accomplices. It is now clear that Pulliam could not, through the exercise of reasonable diligence, have discovered this fraud, conspiracy and collusion prior to the trial of this action, in July, 1992, or at the time he filed his prior Rule

60(b) Motion. Accordingly, Petitioner Pulliam is now entitled to a new trial at which the true facts can be shown.

Respectfully, Petitioner submits that the giving of this incorrect testimony constituted such "fabrication of evidence" as would entitle him to relief under Rule 60(b).
That new evidence is as follows:

a. Pritchett's false statements.

As noted above, the instant case came on for trial on June 30, 1992, July 1, 1992, and July 2, 1992. Peoples Bank's counsel, Charles F. Pritchett, Jr., testified at that time on behalf of Ohio Casualty. Upon cross-examination, Petitioner Pulliam's counsel, Mr. Hubbard, asked attorney Pritchett whether there had been a settlement between Prudential and Barnett Bank. Mr. Pritchett admitted that there had been such a settlement, and that Pritchett knew the amount of the settlement, but he declined to state the amount, and the Court did not compel him to do so.

Mr. Pritchett also stated that he did not know whether Prudential had any right of recoupment against Barnett Bank. This statement was clearly false, since the Release and Agreement of which Attorney Pritchett had obtained a copy more than four years prior, clearly set out the conditions under which Prudential was entitled to be reimbursed.

Attorney Pritchett was also asked about certain Video stock certificates which Peoples Bank and Barnett Bank had been holding as collateral for the loans of Douglas Murdock, Excellence Land, and Prudential's agent, Donald Tibbitts. Attorney Pritchett stated that Barnett Bank's counsel had told him the certificates "were worthless." This statement was clearly **untrue**, since Barnett Bank had provided Attorney Pritchett with discovery showing that Barnett Bank's brokerage had stated that each of the two Video stock certificates was each worth at least three million dollars ($3,000,000.00), well in excess of the total amount of Barnett Bank's (supposed) loss.

Attorney Pritchett also testified that Barnett Bank's counsel had told him that the Prudential letters of credit "were bogus" When he so testified, Attorney Pritchett must necessarily have known that Prudential had, in fact, paid Barnett Bank the

sum of $282,500.00 based on those Prudential letters of credit. Mr. Pritchett's response to this question was, at best, ingenuous and misleading, if not absolutely false. If Barnett Bank's counsel, Mr. Milliman or Ms. Jakubowicz, told Attorney Pritchett that these Prudential letters of credit were "bogus," when they were not, then Barnett's counsel misled the court and Peoples Bank's counsel. Prudential had, in fact, paid $282,500 based on these letters of credit seven months prior, on June 30, 1987. The Jefferson Circuit Court action was filed on February 1, 1988.

Furthermore, Ohio Casualty's trial attorney, James W. Smirz, Esq., was also in possession of the agreement between Barnett Bank and Prudential, and attorney Smirz must necessarily have known that attorney Pritchett's testimony was untrue. Ohio Casualty's counsel, therefore, knowingly permitted attorney Pritchett to present erroneous testimony to that Court and the jury, and failed to advise that Court, either at that time or later, that incorrect testimony had been given.

b. Ohio Casualty's false statements.

In Ohio Casualty's Response to Petitioner Warren Pulliam's prior Motion to Set Aside the Judgment which Ohio Casualty filed in this action in the trial court on November 20, 1995, Ohio Casualty **five times** stated that it did **not** participate in the settlement negotiations between Barnett Bank and Peoples Bank (Response to Motion to Set Aside Judgment at page 3, Lines 10_11; page 4, lines 26_27, ("this alleged fraud occurred in an agreement to which Ohio Casualty was not a party"); page 6, lines 7-8, ("It is based upon an agreement to which Ohio Casualty was not a party, and to which Ohio Casualty owed no obligations to Pulliam"); page 6. lines 16-17 (characterizing the settlement negotiations as "not the concern of Ohio Casualty"); page 7, lines 5-6 ("all to which Ohio Casualty was not an original party").

Ohio Casualty made similar representations in the Nelson Circuit Court action, 93-CI-00130. In response to interrogatories propounded to it by Warren Pulliam's co-defendant in that action Paul A. Sims (hereafter referred to as "Sims"), Ohio Casualty responded that "Ohio did not settle the

action styled Barnett Bank of Tampa, N.A. v. Peoples State Bank of Chaplin, Ky." (Motion to Alter, Amend or Vacate) In response to a Motion to Deem Admitted filed in the Nelson Circuit Court action, Ohio Casualty stated: "Ohio Casualty did not settle the Jefferson Circuit Court action." (Motion to Alter, Amend or Vacate).

At a hearing conducted in camera by Judge Raikes on February 2, 2000, Ohio Casualty's counsel repeatedly asserted that Ohio Casualty had taken no part in the settlement negotiations (Motion to Alter, Amend or Vacate, page 4, line 17)("we haven't been a party to any of that"); page 6, line 4 ("Ohio Casualty's not a party to that settlement agreement"); page 11, line 14 ("Ohio Casualty is not a party to those transactions"); page 12, line 1 ("Ohio Casualty's not a party to that agreement"); page 12, line 4 ("Ohio Casualty wasn't a party to that lawsuit"); page 13, line 19 ("we're not a party to that transaction"); page 15, line 8 ("We're not a party to that"); page 15, line 9 ("I mean we weren't a party").

At one point in his colloquy with Judge Raikes and Pulliam's counsel, John Douglas Hubbard and Charles Zimmerman, Ohio Casualty's counsel, Timothy D. Martin, stated categorically:

> But there is no agreement that Ohio Casualty is a party to with Barnett Bank and Peoples State Bank, the three of them. There is no such agreement.

These assertions simply were not true, and Ohio Casualty must necessarily have known that the statements were not true when it made them.

In an internal memorandum dated April 17, 1989, three weeks after Jefferson Circuit Court had compelled Barnett Bank to produce the Agreement and Release between Prudential and Barnett Bank, and after Barnett Bank and Peoples Bank had begun negotiating a settlement of the Jefferson Circuit Court action, Ohio Casualty's Fidelity and Surety claims representative, William Thomas Jones, described in detail meetings which he had conducted with Ohio Casualty's counsel, Peoples Bank's counsel, and with Petitioner Pulliam and his wife. Jones wrote:

> On April 14, 1989 I was in our Louisville Claims

> Office when Peoples State Bank's attorney, Charles Pritchett, called and also our attorney, James Smirz, called. The three of us discussed a proposed settlement offer to Barnett Bank and we agreed upon an initial settlement of $140,000.00. Peoples State Bank "Jim King personally" has agreed to initially contribute $50,000.00 towards any settlement offer made. This may be Peoples' final contribution however that aspect as well as recovery priority rights will be worked out between Ohio Casualty and Peoples at a later date.

Mr. Jones then described a meeting he had conducted with Petitioner Pulliam and his wife, later that same day. Mr. Jones noted that Pulliam had indicated that he wished to defend the action, and observed:

> Again, we need to keep in mind that the bank has an Indemnity Agreement or Settlement Agreement from Mr. Pulliam and we can work out some type of agreement to have the bank assign their rights of recovery or restitution to us.

This language clearly shows that when Jones discovered that Pulliam was planning to defend the Barnett Bank action, he and attorney Pritchett of Peoples Bank decided to settle the case without Pulliam's knowledge, and while Mr. King and Peoples Bank were in possession of Pulliam's "restitution agreement." They planned to then recoup the entire amount of their settlement from Pulliam.

Consequently, Peoples Bank and Ohio Casualty never attempted to join any of the other tortfeasors as third-party defendants, although Peoples Bank had stated in its answer (in its Fourth and Fifth Defenses) **that such persons and entities were necessary and indispensable parties.** To that same end, Peoples Bank and Ohio Casualty did **not** pursue any defenses to the Jefferson Circuit Court action, although they well knew that such defenses were available.

Jones' memorandum to file then continued:

> Immediately before I left and in the presence of his wife, Mr. Pulliam inquired as to whether or

> not an offer was presented to Barnett Bank today. I assured him Attorney Pritchett was to present an offer to Barnett Bank, however, Mr. Pulliam and I did not discuss the details of the settlement.

Copies of this internal memorandum were sent to Hollie Sharp, the claims manager of Ohio Casualty's Louisville, Kentucky office and to Ohio Casualty's counsel, "Atty. Jim Smirz, LANDRUM & SHOUSE, 106 West Vine Street, P.O. Box 951, Lexington, KY 40588_0951."

March 1, 1993, Jones executed an affidavit which was filed in a related action in Nelson Circuit Court. In that affidavit, Jones stated: "Ohio Casualty participated in a settlement of the claims asserted by Barnett Bank based upon the actions of Warren Pulliam."

It is clear, therefore, that contrary to the statement which Ohio Casualty's counsel Timothy D. Martin later made, repeatedly, to the court below and to Nelson Circuit Court, Ohio Casualty was integrally involved in negotiations for settlement of the Jefferson Circuit Court action.

If further proof of that fact were required, Peoples Bank's President, James O. King, Jr., stated in a Memorandum which he filed in action 3:02CV-727-C, Western District of Kentucky, *Paul A. Sims, et al. v. Ohio Casualty Insurance Co., et al.*; on December 13, 2002:

> The Ohio Casualty Insurance Company - Peoples State Bank's fidelity insurance carrier - settled the claims of Barnett Bank against Peoples State Bank.

Moreover, when Jones testified at his deposition in April, 2002, he confirmed the fact that Ohio Casualty had been involved in those negotiations from the very first, and that it had fully intended to force Petitioner Pulliam to pay the entire amount:

> Q: When you had the discussion and decided upon a settlement offer amount, you were intending subsequently to seek recovery of that amount from Mr. Pulliam?
>
> A: Absolutely.

As part of the agreed settlement, Peoples Bank and Barnett Bank procured five separate agreed orders from Jefferson Circuit Court preventing the release of the settlement and the evidence which had been submitted by both parties. Petitioner Pulliam believes, and continues to insist, that the entry of these protective orders is further evidence of the parties' collusion to prevent him from ascertaining the true facts underlying the judgment which he was later asked to pay.

This assumption finds additional support in the fact that, at the trial of the instant action, Pulliam's counsel, Mr. Hubbard, advised Judge Johnstone at sidebar conference, that counsel for Peoples Bank and Ohio Casualty had agreed to include Mr. Pulliam in the settlement negotiations, and had then settled the Jefferson Circuit Court action without further consulting Pulliam or his attorney, Mr. Hubbard, or advising him of the intended settlement agreement. The Court will note that, while Ohio Casualty's counsel, Mr. Parker, avoided making any direct response to Mr. Hubbard's allegations, he clearly did not deny that these allegations were true. Mr. Hubbard has also submitted an Affidavit to this effect.

3. Respondent is estopped to assert limitations and laches as a defense.

In the response which it filed in the Court below, Ohio Casualty did not deny that it, in collusion with Peoples Bank, and others, concealed the pertinent facts from its indemnitor, Warren Pulliam. Ohio Casualty responded, rather, that Pulliam was guilty of laches for not having discovered the fraud sooner than he did. In its Memorandum, Ohio Casualty noted that Pulliam raised many of these issues in the Answers to Interrogatories which he filed on October 2, 1990. Respondent then added:

> This case was subsequently tried to a jury in **July 1992.** Therefore, Pulliam had approximately **two years** to investigate and take discovery relating to any and all of these issues before presenting this action to the jury for trial.

(Respondent's Memo. at 2)(emphasis in original.)

Ohio Casualty has evidently failed to note that it is

estopped to assert either limitations or laches as a defense to this action by the equitable doctrine of unclean hands. As this Court has explained:

> The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abettor of iniquity." Thus while "equity does not demand that its suitors shall have led blameless lives," as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.
>
> This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

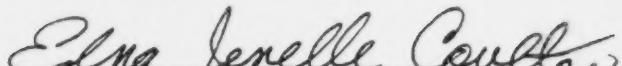
Precision Co. v. Automotive Co., 324 U.S. 806, 814-15 (1945)(citations omitted); *Keystone Co. v. Excavator Co.*, 290 U.S. 240, 244-45 (1933)("if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, he will be held remediless.")

As shown above, Ohio Casualty well knew, before it filed this lawsuit, that the amount claimed by Barnett Bank in the Jefferson Circuit Court action, # 88-CI-00812, *Barnett Bank of Tampa, N.A. v. Peoples State Bank, Chaplin, Kentucky,* was incorrect. Although Ohio Casualty knew the true facts of the case, and that Barnett Bank had overstated the amount of its loss by $201,500.00, when it filed the instant Complaint, Ohio Casualty attached to its Complaint a "proof of Loss Supplemental Sheet" which stated the amount of Barnett Bank's loss as "$834,000." (R. 139 Motion to Alter, Amend or Vacate, Exhibit 1, Apx. Pg. 795)

CONCLUSION

As shown above, the judgment of the court below was clearly erroneous and must be reversed. This Court, therefore, should grant certiorari to the United States Court of Appeals for the Sixth Circuit and, upon hearing, remand the action to the trial court with directions that the action be reinstated on the court's docket and that the parties proceed expeditiously to trial. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,



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APPENDIX

APPENDIX A

RULE 60 (b), F.R.C.P.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under **Rule 59(b)**; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in **Title 28, U.S.C., §§ 1655**, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX B

04-6500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO CASUALTY INSURANCE CO. Plaintiff-Appellee	)	
v.	)	ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
WARREN L. PULLIAM Defendant-Appellant	)	

Before: DAUGHTREY and COLE,, Circuit Judges, and BARZILAY,* Judge

PER CURIAM. The defendant, Warren Pulliam, appeals the district court's denial of his motion, filed pursuant to Federal Rule of Civil Procedure 60(b), to vacate a judgment entered against Pulliam by the district court in 1992. In affirming the judgment, we trust that our ouder will wne the seemingly endless round of litigation in this diversity action that grew out of events dating back some 20 years.

In a previous stage of the litigation, we described its protracted procedural history as follows:

> Pulliam was a principal owner and President of Peoples State Bank. On December 17, 1986, Pulliam agreed to indemnify Peoples State Bank for losses arising from his wrongful issuance of certified checks. Peoples State Bank assigned its rights under this restitution agreement to Ohio Casualty.

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* The Hon. Judith M. Barzilay, Judge of the United States Court of International Trade, sitting by designation.

As we noted in our 1999 opinion examining the propriety of the disctict court's denial of Pulliam's 1995 Rule 60(b) motion, such a denial is reviewed by an appellate court only "for an abuse of discretion . . . [and] does not bring up for review the underlying judgment." *Id.* at *2 (citing *Windsor v. United States Dep't of Justice*. 740 F.2d 6, 7 (6th Cir. 1984)). An "[a]buse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)(quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)).

Recognizing that the interests of justice sometimes demand that a hudgment not be enforced against a particular party, Rule 60(b) of the Federal Rules of Civil Procedure provides for such relief for certain familiar, designated reasons. Specifically, a party may be relieved of a judgment entered against it on grounds of:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). Any motion seeking relief under grounds (1), (2), or (3) must be filed with the district court "not more than one year after the judgment, order, or proceeding was entered or taken." *Id.* Motions pursuant to grounds (4), (5), or

(6) "shall be made within a reasonable time." *Id.*

In his latest attempt to extricate himself from the burdens of the judgment entered against him in 1992, Pulliam asserts that he "was the victim of fraud, conspiracy and collusion." Correctly equating that allegation with the grounds for relief enumerated in subsection (3) of Rule 60(b), Ohio Casualty now echoes the ruling of the district court and argues that the defendant's motion was filed long after the expiration of the one-year deadline envisioned by the drafters of the rule. To the extent that the defendant himself was the victim of such fraud, Ohio Casualty is correct and it entitled to dismissal of Pulliam's motion.[1] In his 2004 filing, however, the defendant also alleges that fraud was committed not only upon him, but also upon the district court and two Kentucky state courts during the course of this litigation. Because Rule 60(b) explicitly states that the "rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court," the one-year restriction on alleging grounds for relief from judgment does not apply to the extent that Pulliam can establish such "fraud upon the court."

In *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993) we noted that "fraud upon the court," unlike other fraud, consists of conduct:

1. On the part of an officer of the court;
2. That is directed to the "judicial machinery" itself;
3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when

---

1. Before this court, Pulliam intimates that the Kentuckyu Supreme Court decision in *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 818 (Ky. 2002), which, for the purposes of Kentucky alw, equated "fraud on a party" with "fraud affecting the proceedings," eliminates any distinctions between the two manifestations of fraud. Regardless of the merit or lack of merit of the Kentucky position, the justices of the Kentucky Supreme Court cannot alter the framework of *Federal* Rule of Civil Procedure 60(b) that is to be applied in *federal* court proceedings.

one is under a duty to disclose;

5. That deceives the court.

In an effort to establish "fraud upon the court," Pullliam submits that he can now prove, as described in his brief:

> (1) that the Complaint which Barnett Bank filed in the underlying Jefferson Circuit Court action overstated the amount of Barnett Bank's loss by $201,500.00; (2) that Ohio Casualty, contrary to the declarations which it made to the court below and to Nelson Circuit Court, actively participated in the setlement of the underlying action; (3) that Ohio Casualty knew that Barnett Bank's complaint contained a false statement of material fact, and failed to advise Jefferson Circuit Court, the trial court, or this Court of that fact; (4) that Ohio Casualty overstated the amount of damages in paragraph 19 of the instant Complaint; (5) that Ohio Casualty attached an Exhibit to the Complaint which it filed in the instant case which overstated the amount of Barnett's loss by $201,500.00, although it well knew that the amount set out therein was erroneous; and (6) that Ohio Casualty also . . . elicited untrue testimony from Peoples Bank's counsel at the trial of the instant action; and after having done so, failed to advise the court below that erroneous testimony ahd been given.

Boiled down to its essence, Pulliam's assertion of "fraud upon the court" stems from the fact that Barnett Bank's complaint against Peoples Bank sought recovery of approximately $835,000 paid by Peoples by certified checks "without sufficient funds on deposit to cover those checks." According to the defendant, however, the parties knew the actual loss to Barnett Bank was only $633,500, of $210,500 less than the parties led the courts to believe. But *Demjanjuk*

requires that, in order to establish fraud upon the court, any misstatements by an officer of the court actually deceive the court. *See, Demjanjuk*, 10 F.3d a 348. Because the banks, wih or without the assistance of Ohio Casualty, eventually settled the disagreement between them for *$200,000*, the courts could not have been deceived by the failure of the parties to correct any inaccuracies contained in pleadings or testimony that asserted that a much higher amount of money was at issue. Puliam has thus failed to establish fraud upon *the court* by this simple discrepancy.

Pulliam further asserts that the plaintiff helped perpetuate a fraud upon the court by failing to divulge the fact that Barnett Bank had received partial compensation for its loss from another entity not a party to this appeal. In his brief to this court, however, the defendant concedes that the "secret" recovery paid only $282,500 of Barnett Bank's loss that was caused by Pulliam's misdeeds. Thus, Ohio Casualty, by contract, would still have been responsible for repaying $351,000 ($633,500 less $282,500) of Peoples Bank's liability. Again, because the ultimate $200,000 judgment rendered against Pulliam was significantly less than the amount for which the defendant was still responsible, the court and the judicial process were not prejudicially deceived by any actions alleged by the defendant. Consequently, the district court did not abuse its discretion in denying the defendant's Rule 60(b) motion.

We therefore AFFIRM the district court's order denying the Rule 60(b) motion, although for a reason different from that relied upon by the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

OHIO CASUALTY INS. CO. PLAINTIFF

v. CIVIL ACTION NO. 3:90CV-0367-S

WARREN L. PULLIAM DEFENDANT

MEMORANDUM OPINION AND ORDER

In his motion to alter, amend or vacate a judgment entered against him in this court on July 8, 1992, following a jury trial, Warren L. Pulliam contends that he should be relieved of said judgment because newly-discovered evidence indicates that the judgment was obtained as a result of fraud, misrepresentation, or other misconduct of an adverse party.

This is Pulliam's second motion filed pursuant to FED. R. CIV. P. 60(b). An earlier motion, filed in 1995, was denied by Judge Johnstone. The United states Court of Appeals for the Sixth Circuit affirmed in 1999.

In the instant motion, filed on March 5, 2004, Pulliam makes a second attempt to be relieved of the judgment. He has filed voluminous briefs challenging testimony and proceedings in earlier litigations. However, upon review and consideration, it is crystal clear that Pulliam's motion comes far too late. FED. R. CIV. P. 60(b).

The motion to alter, amend, or vacate is accordily **DENIED.**

IT IS SO ORDERED.

October 4, 2004

Charles R. Simpson III, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

OHIO CASUALTY INS. CO. PLAINTIFF

v. CIVIL ACTION NO. 3:90CV-0367-S

WARREN L. PULLIAM DEFENDANT

ORDER

The court having been fully advised, **IT IS ORDERED** that the motion of the defendant, Warren L. Pulliam, to alter or amend is **DENIED.**

November 17, 2004

Charles R. Simpson III, Judge
United States District Court

APPENDIX E

04-6500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO CASUALTY INS. CO.	)	
	)	
Plaintiff-Appellee	)	
	)	ON APPEAL FROM THE
v.	)	U. S. DISTRICT
	)	COURT FOR THE
WARREN L. PULLIAM	)	WESTERN DISTRICT OF
	)	KENTUKY
Defendant-Appellant	)	

Before: DAUGHTREY and COLE, Circuit Judges, and BARZILAY,* Judge

The court having received a petition fo rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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* The Hon. Judith M. Barzilay, Judge of the United States Court of International Trade, sitting by designation.